

June 30, 2004

To: District Health Directors
District Environmental Health Managers
Office of Environmental Health Services
VPI and SU Soil Scientists

From: Robert B. Stroube, M.D., M.P.H.
State Health Commissioner

Subject: Implementation of House Bill 930

Guidance Memoranda and Policies

GMP #124

I. Background.

The 2004 General Assembly passed House Bill 930 (Acts of Assembly, Chapter 916, 2004) which amends § 32.1-164.1:1 of the *Code of Virginia* by adding the following subsection:

- B. Further, whenever any onsite sewage system is failing and the Board's regulations for repairing such failing system impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage system when operating properly or (ii) a new requirement for pressure dosing, the owner may request a waiver from such requirements. The Commissioner shall grant any request for such waiver, unless he finds that the failing system was installed illegally without a permit. Any such waivers shall be recorded in the land records of the clerk of the circuit court in the jurisdiction in which the property on which the relevant onsite sewage system is located. Except between a husband and a wife, waivers granted hereunder shall not be transferable and shall be null and void upon transfer or sale of the property on which the onsite sewage system is located. Additional treatment or pressure dosing requirements shall be imposed in such instances when the property is transferred or sold.*

The owner of the relevant property shall disclose, in writing, to any and all potential purchasers or mortgage holders that any operating permit for the onsite sewage system that has been granted a waiver authorized by this subsection shall be null and void at the time of transfer or sale of the property and that the Board's regulatory requirements for additional treatment or pressure dosing shall be required before an operating permit may be reinstated.

This guidance document outlines procedures for processing applications for construction permits for repairing or replacing failing sewage systems, suggested letters, and an Agreement to be executed by any owner requesting a Waiver under the new law.

II. General.

The new law is intended to offer financial relief to the current owner of a property whose system is failing and who is facing the requirement(s) for secondary treatment, pressure dosing, or both. The owner may request a waiver from those requirements and the waiver must be granted unless the Commissioner finds "that the failing system was installed illegally without a permit." The waiver is transferable only between a husband and a wife. Any other transfer of the property voids both the waiver and the current operating permit for the system, even if that system is not overtly failing at the time of the transfer. In order to obtain a new operating permit, the new owner must comply with the requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 et seq., as amended July 1, 2000, the *Regulations*) that were waived as well as any subsequent requirements that may have been imposed since the waiver was granted. Any owner who receives a waiver is required by law to record the Waiver in the land records of the circuit court and to disclose the waiver in writing to any potential purchaser or mortgage holder.

The responsible Environmental Health Specialists Senior (EHSS) will identify potential candidates for waivers as part of the routine processing of repair applications. If the EHSS finds that a repair permit can be issued that substantially complies with the *Regulations* for a system utilizing septic tank effluent (STE) without pressure dosing, he will follow normal procedures for issuing a permit and there is no need to inform the owner of the waiver process. If the EHSS cannot issue a permit that substantially complies with the *Regulations* for a STE system, or if pressure dosing is required for a STE system, he will notify the owner of the need for a secondary effluent (SE) system and/or pressure dosing.

Virginia Department of Health (VDH) personnel are not authorized to design systems that require pressure dosing or secondary treatment with or without pressure dosing. The law anticipates that upon transfer of the property, the system will be brought into compliance with the current regulations, to the greatest extent possible. This means upon transfer of the property, the secondary treatment system and/or pressure dosing method that was waived for the current owner will be added for the new owner (note: transfers between husbands and wives are

exempted). VDH therefore expects all repair systems designed using this waiver be made in a way that anticipates the subsequent inclusion of the pretreatment and/or pressure dosing components.

Such system designs require the ability to either specify a product by its brand name or to design a treatment system from scratch in order to assure compatibility with future system upgrades. In addition, extensive consulting is required between the designer and the owner of the system in order to assure that the owner's needs are addressed. Such individual consulting is not supported by the fees currently established for onsite sewage system applications and VDH does not have sufficient resources to support such activities. *The design of these systems must be accomplished by an Authorized Onsite Soil Evaluator (AOSE) or by a Professional Engineer (PE) whether or not the owner receives a waiver.*

Attachment #1 contains a letter notifying the owner of the requirement(s) for SE with or without pressure dosing, that the waiver is available, and that the owner must employ an AOSE or a PE to prepare plans and specifications for the repair system. Attachment #2 contains a similar letter notifying the owner of the requirement(s) for STE with pressure dosing, informing the owner that the waiver is available, and informing the owner of the requirement that he employ an AOSE or a PE to prepare plans and specifications for the repair system. Prior to sending one of these letters by certified mail, the EHSS will determine whether the failing system was installed illegally without a permit. If the EHSS finds substantial evidence that the system was installed illegally without a permit, he should immediately inform the appropriate VDH supervisory personnel to initiate enforcement proceedings. The letters in Attachments #1 and #2 do not apply to any system that was installed illegally without a permit.

The responsible EHSS is expected to make reasonable efforts to educate applicants about the public health and environmental benefits of secondary treatment and/or pressure dosing, but he should not unnecessarily delay the applicant on this account. VDH staff shall not advise owners about whether or not to request a waiver; instead, staff should encourage owners to seek advice from private advisors such as attorneys or real estate professionals.

An owner wishing to receive the waiver must return the properly executed waiver request and agreement found in Attachment #3 with his AOSE or PE plans for the repair or replacement system. When properly executed by the owner, Attachment #3 constitutes the request for waiver, the owner's agreement to release VDH and the Commonwealth of liabilities associated with the waiver, and the waiver itself. The process for issuing a construction permit with a waiver is the same as that for issuing a conditional permit under § 250.J of the *Regulations*. When the owner produces written proof (certification) that he has recorded the waiver in the land records, the construction permit is released and it becomes effective one day later. An owner who does not wish to receive a waiver may resubmit his application with AOSE/PE plans in the normal manner.

Responsibility and authority for implementing the new law is hereby delegated to the district health directors.

III. Terms.

Pressure Dosing- means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not include gravity systems, systems that pump effluent to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

Treatment beyond the level of treatment provided by the existing system when operating properly- The *Regulations* require an owner to provide secondary treatment for the repair of a failing system if the repair or replacement system does not “substantially comply” with the requirements of the *Regulations* for a system with STE. The most common application of this term is expected to occur when an owner of a individual single-family home needs a repair permit that involves replacing all or part of the soil absorption system, the existing system is a STE system, and the site and soil conditions do not substantially comply with the *Regulations* for a STE system. In such cases the owner is required to provide secondary treatment (SE) as part of the design of the repair system.

For the purposes of implementing House Bill 930 any system installed under any regulation other than the *Regulations* is deemed to have had a requirement for STE, unless treatment beyond STE was specifically required at the time the system was originally permitted. Examples of such specific additional treatment requirements include, but are not limited to variances, terms of settlement of appeals or orders of the Appeal Review Board, Orders of the Board of Health (includes consent orders), mass drainfields, designs by a PE or by an AOSE/PE, and proprietary pre-engineered systems approved by VDH (listed in GMPs).

System “installed illegally without a permit”- means that there is substantial evidence that an owner (either the current one or a previous one) installed an onsite sewage system intentionally without a permit at a time when there was a requirement to obtain a permit prior to installing an onsite sewage system. The mere lack of permit documentation in VDH files is not substantial evidence that a system was installed illegally without a permit. There must be additional

evidence that supports a conclusion that a person knew a permit was required and intentionally installed a system without one. In other cases VDH has relied upon evidence such as a prior permit denial for the same property, a building permit issued for a different type of structure (i.e. building permit issued for a barn or shed, but instead a home was built), and records of other local government offices. Please contact the Division of Onsite Sewage and Water Services if there are questions about a specific case.

List of Attachments:

1. Attachment #1: Letter to Applicant, SE with or without Pressure Dosing Required
2. Attachment #2: Letter to Applicant, STE/Pressure Dosing Required
3. Attachment #3: Request for Waiver/Release and Hold Harmless Agreement/Waiver

Attachment 1: Letter- Bare Application for repair permit, Secondary Effluent with or without Pressure Dosing - Plans from PE or AOSE Required

Date

Owner Name
Address
City, State Zip

Certified Mail

Dear [Owner]:

On [date], the [] County Health Department received your application for a sewage system repair permit which did not include supporting documentation from an AOSE/PE.¹ Based on our site and soil evaluations (copy attached), the conditions on your lot do not substantially comply with the minimum requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20, as amended July 1, 2000, the *Regulations*) for a Septic Tank Effluent (STE, *Regulations*, § 594) system for the following reasons:²

(Choose one or more or add as appropriate.)

1. Insufficient vertical separation from a limiting factor such as the seasonal water table, a restrictive horizon, rock, etc.
2. Insufficient horizontal separation from well, shellfish waters, etc....

The repair system for your property must utilize Secondary Effluent (SE, *Regulations*, § 280).³ It may also be necessary under the *Regulations* to incorporate ‘pressure dosing’ in the design of your repair system.⁴ These requirements in the *Regulations* provide additional public health and groundwater protections where failed systems pose relatively high risks for human disease transmission.

Employees of the Virginia Department of Health (VDH) do not design sewage systems with SE or pressure dosing due to the complexity of these designs and the wide variety of brand-name products and equipment available. These types of designs require extensive consultation between the owner and the designer to assure that the owner’s needs are met, and in some cases the services of a PE may be required. You will need to secure the services of a qualified designer to design your repair or replacement system. Currently, VDH recognizes PEs (licensed in the Commonwealth of Virginia) for any type of system design and AOsEs for certain system designs that do not require the practice of engineering. Since we cannot issue a construction permit at this time without the required plans and

¹ AOSE/PE means a Professional Engineer (PE) working in consultation with an Authorized Onsite Soil Evaluator (AOSE) or an AOSE.

² Septic Tank Effluent means “effluent characterized by a five-day biochemical oxygen demand between 120 and 200 mg/l; total suspended solids between 70 and 150 mg/l; fats, oils, and grease of 30 mg/l or less; and having no other toxic, hazardous, or constituents not routinely found in residential wastewater flows (*Regulations*, § 120).”

³ Secondary Effluent means “effluent treated to reduce five-day biochemical oxygen demand to 30 mg/l or less, total suspended solids to 30 mg/l or less, and fats, oils, and grease to less than 5 mg/l (*Regulations*, § 120).”

⁴ Pressure Dosing means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not include gravity systems, systems that pump to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

Name
Date
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specifications, we are unable to process your application. You may resubmit your application for a repair permit when you are ready to do so.

The Virginia General Assembly passed a law, effective July 1, 2004, that allows you to receive a Waiver from the requirements for SE and/or pressure dosing as long as your system was not installed illegally without a permit (*Code of Virginia*, § 32.1-164.1:1). I have determined that you are eligible for the Waiver if you choose to apply for it. If you wish to receive the Waiver, please complete the enclosed Waiver Request, Agreement, and Waiver document and return it to this office with your AOSE/PE plans for the repair or replacement system.

If you choose to request and receive the Waiver, you will need to have your signature notarized. This is a legal document and you should review it carefully. You may wish to seek legal advice from an attorney. The *Code of Virginia* requires that you record the Waiver in the land records of the clerk of the circuit court in the jurisdiction in which your property is located. A Waiver may only be obtained one time for a given system and it is only transferable between a husband and wife.

The Waiver and the operating permit for your system are both null and void immediately whenever your property is transferred to any person (or entity) other than your spouse (husband or wife). It is unlawful to operate an onsite sewage system without a valid operating permit (*Regulations*, § 240). This means that any new owner will not be able to occupy the dwelling/structure and operate the sewage system until he obtains a new operating permit. The new owner will need to apply for and obtain a new construction permit that complies with those parts of the *Regulations* that were waived (i.e. secondary treatment and/or pressure dosing) and any new requirements that may have been adopted after the Waiver was granted. Once those upgrades are accomplished, the operating permit for the system can be reinstated. You are required by law to disclose these conditions, in writing, to any and all potential purchasers or mortgage holders. *These requirements apply to your system, even if it does not appear to be failing at the time of transfer.*

Once you have decided whether you will receive the Waiver, you will need to communicate your choice to your system designer (AOSE/PE). When your system plans are ready, you may resubmit your application for a repair permit. If you have chosen to ask for the Waiver you may simply enclose the properly executed form and certificate of recordation with your system plans.

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Date
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You may receive (or have already received) a letter from this office notifying you that the failure of your sewage system may constitute a violation of the *Regulations*. Please follow any directions contained in that letter and carefully heed any time limits established for repairing your failing system. Because your sewage system has failed, your sewage system operation permit is null and void in accordance with 12 VAC 5-610-340 of the *Regulations*. As I mentioned earlier in this letter, you are required to have an operating permit in order to use an onsite sewage system and I encourage you to complete the steps necessary to get a new operating permit as quickly as possible.

You have a right to challenge this decision regarding VDH's site and soil evaluations and the requirement for a Secondary Effluent with or without pressure dosing system by requesting an informal hearing. Your written request for a hearing must be received in this office no later than 30 days from the date you receive this letter. Thank you for your prompt attention to this matter. Please call me at (_____) _____ - _____ if you have questions.

Sincerely,

EHSS

Attachments: (2)

Attachment 2: Letter- Bare Application for repair permit, STE with Pressure Dosing and Plans from PE or AOSE Required

Date

Owner Name
Address
City, State Zip

Certified Mail

Dear [Owner]:

On [date], the [] County Health Department received your application for a sewage system repair permit which did not include supporting documentation from an AOSE/PE.⁵ Based on our site and soil evaluations (copy attached), the conditions on your lot do not substantially comply with the minimum requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20, as amended July 1, 2000, the *Regulations*) for a gravity or non-pressure-dosed Septic Tank Effluent (STE, *Regulations*, § 594) system because the available area is not large enough to accommodate a properly sized system under the *Regulations*.⁶

The repair system for your property must utilize a pressure dosed system with or without secondary effluent.⁷ This requirement in the *Regulations* provides additional public health and groundwater protections where failed systems pose relatively high risks for human disease transmission.

Employees of the Virginia Department of Health (VDH) do not design sewage systems with pressure dosing due to the complexity of these designs and the wide variety of brand-name products and equipment available. These types of designs require extensive consultation between the owner and the designer to assure that the owner's needs are met, and in some cases the services of a PE may be required. You will need to secure the services of a qualified designer to design your repair or replacement system. Currently, VDH recognizes PEs (licensed in the Commonwealth of Virginia) for any type of system design and AOSEs for certain system designs that do not require the practice of engineering. Since we cannot issue a construction permit at this time without the required plans and specifications, we are unable to process your application. You may resubmit your application for a repair permit when you are ready to do so.

⁵ AOSE/PE means a Professional Engineer (PE) working in consultation with an Authorized Onsite Soil Evaluator (AOSE) or an AOSE.

⁶ Septic Tank Effluent means "effluent characterized by a five-day biochemical oxygen demand between 120 and 200 mg/l; total suspended solids between 70 and 150 mg/l; fats, oils, and grease of 30 mg/l or less; and having no other toxic, hazardous, or constituents not routinely found in residential wastewater flows (*Regulations*, § 120)."

⁷ Pressure Dosing means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not include gravity systems, systems that pump to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

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The Virginia General Assembly passed a law, effective July 1, 2004, that allows you to receive a Waiver from the requirements for pressure dosing as long as your system was not installed illegally without a permit (*Code of Virginia*, § 32.1-164.1:1). I have determined that you are eligible for the Waiver if you choose to apply for it. If you wish to receive the Waiver, please complete the enclosed Waiver Request, Agreement, and Waiver document and return it to this office with your AOSE/PE plans for the repair or replacement system.

If you choose to request and receive the Waiver, you will need to have your signature notarized. This is a legal document and you should review it carefully. You may wish to seek legal advice from an attorney. The *Code of Virginia* requires that you record the Waiver in the land records of the clerk of the circuit court in the jurisdiction in which your property is located. A Waiver may only be obtained one time for a given system and it is only transferable between a husband and wife.

The Waiver and the operating permit for your system are both null and void immediately whenever your property is transferred to any person (or entity) other than your spouse (husband or wife). It is unlawful to operate an onsite sewage system without a valid operating permit (*Regulations*, § 240). This means that any new owner will not be able to occupy the dwelling/structure and operate the sewage system until he obtains a new operating permit. The new owner will need to apply for and obtain a new construction permit that complies with those parts of the *Regulations* that were waived (i.e. pressure dosing) and any new requirements that may have been adopted after the Waiver was granted. Once those upgrades are accomplished, the operating permit for the system can be reinstated. You are required by law to disclose these conditions, in writing, to any and all potential purchasers or mortgage holders. *These requirements apply to your system, even if it does not appear to be failing at the time of transfer.*

Once you have decided whether you will receive the Waiver, you will need to communicate your choice to your system designer (AOSE/PE). When your system plans are ready, you may resubmit your application for a repair permit. If you have chosen to ask for the Waiver you may simply enclose the properly executed form and certificate of recordation with your system plans.

You may receive (or have already received) a letter from this office notifying you that the failure of your sewage system may constitute a violation of the *Regulations*. Please follow any directions contained in that letter and carefully heed any time limits established for repairing your failing system. Because your sewage system has failed, your sewage system operation permit is null and void in accordance with 12 VAC 5-610-340 of the *Regulations*. As I mentioned earlier in this letter, you are required to have an operating permit in order to use an onsite sewage system and I encourage you to complete the steps necessary to get a new operating permit as quickly as possible.

Name
Date
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You have a right to challenge this decision regarding VDH's site and soil evaluations and the requirement for a pressure dosed system by requesting an informal hearing. Your written request for a hearing must be received in this office no later than 30 days from the date you receive this letter. Thank you for your prompt attention to this matter. Please call me at (____) _____ - _____ if you have questions.

Sincerely,

EHSS

Attachments: (2)

Attachment 3

REQUEST FOR WAIVER, RELEASE, HOLD HARMLESS and INDEMNIFICATION AGREEMENT, & WAIVER

This document, which includes a REQUEST FOR WAIVER, a RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT, and a WAIVER (collectively, the AGREEMENT), is made and entered into this _____ Day of _____, 2004, by and between [name of requester- i.e. John Doe], his/her HEIRS, SUCCESSORS, DEVISEES, AGENTS, ASSIGNS, REPRESENTATIVES and INTERESTS (hereinafter [DOE]) and the COMMONWEALTH OF VIRGINIA, acting through the Department of Health (DEPARTMENT), including, without limitation, any and all of its agencies, boards, and commissions, their insurer(s), officers, directors, employees, representatives, and agents, (hereinafter the COMMONWEALTH OF VIRGINIA).

WHEREAS, [DOE] is the owner of that certain parcel described as _____ [insert legal description of property] containing, among other improvements, an occupied structure consisting of _____ [describe occupied structure- i.e. four bedroom single family dwelling] (the PROPERTY); and

WHEREAS, the Department, in accordance with the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 *et seq.*, as amended July 1, 2000, the REGULATIONS), has determined that the onsite sewage system serving the PROPERTY is failing and must be repaired or replaced; and

WHEREAS, the Department has determined that, under the REGULATIONS, the repair or replacement system must provide Secondary Effluent and/or pressure dosing in order to adequately protect public health and ground and surface water resources; and

WHEREAS, § 32.1- 164.1:1 of the *Code of Virginia* provides that whenever any onsite sewage system is failing and the regulations for repairing such failing system impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage system when operating properly or (ii) a new requirement for pressure dosing, an owner may request a waiver (WAIVER) from the requirements of the REGULATIONS pertaining to Secondary Effluent and/or pressure dosing for a repair system; and

WHEREAS, the State Health Commissioner shall grant such WAIVER, provided that the owner's failing system was not installed illegally without a permit; and

WHEREAS, the Department has determined, and [DOE] affirms, that the failing system currently serving the PROPERTY was not installed illegally without a permit.

REQUEST FOR WAIVER

[DOE], by executing this AGREEMENT, hereby requests that the State Health Commissioner grant the WAIVER provided at §32.1-164.1:1 B. of the *Code of Virginia* from the requirements for _____ Secondary Effluent and/or _____ Pressure Dosing [check as appropriate].

RELEASE, HOLD HARMLESS, and INDEMNIFICATION AGREEMENT

NOW, THEREFORE, in exchange for the mutual promises contained herein, the parties agree as follows:

[DOE] agrees to, and hereby does, release the COMMONWEALTH OF VIRGINIA from any and all claims, complaints, demands, actions, causes of action, liabilities, and obligations of whatever source or nature, whether administrative, legal or equitable, whether known or unknown, which [DOE] now has or may have in the future relating to or arising from the WAIVER, including, without limitation, any and all claims due to the failure of any person to comply with federal, state, or local laws or regulations, claims under the Virginia Tort Claims Act, the Virginia Constitution, the United States Constitution and amendments thereto, or under common law. Furthermore, [DOE] expressly releases the COMMONWEALTH OF VIRGINIA from any and all claims, actions, causes of action, or obligations under the Virginia Onsite Sewage Indemnification Fund, §32.1-164.1:01 of the *Code of Virginia*, that may arise from or be related to the repair, replacement, and/or operation of [DOE's] onsite sewage disposal system pursuant to the WAIVER.

[DOE] also agrees to hold harmless and indemnify the COMMONWEALTH OF VIRGINIA for any sum of money or judgment against the COMMONWEALTH OF VIRGINIA, as well as costs and reasonable attorneys' fees incurred in the defense of any action arising out of or related to the WAIVER.

WAIVER

The WAIVER, provided at §32.1-164.1:1 B. of the *Code of Virginia*, is hereby granted and shall be effective 24 hours after [DOE] provides certification to the DEPARTMENT that this AGREEMENT has been recorded in the land records of the Circuit Court having jurisdiction over the PROPERTY.

Severability. If any portion of this AGREEMENT is held to be void or deemed unenforceable for any reason, the remaining portion shall survive and remain in effect, unless the effect of such severance shall defeat the parties' intent as set forth herein, with the parties asking the Court to construe the remaining portions consistent with the expressed intent of the parties.

Entire Agreement. [DOE] acknowledges that he/she has had an opportunity to consult with an attorney concerning his/her rights and obligations. [DOE] acknowledges that he/she has had sufficient time and opportunity to consider this AGREEMENT with the COMMONWEALTH OF VIRGINIA, that he/she has read this AGREEMENT, that he/she fully understands and agrees to its terms and conditions, and that there exists no other promises, representations, inducements or agreements related to this AGREEMENT, except as specifically set forth herein. Furthermore, [DOE] acknowledges that this constitutes the entire agreement between [DOE] and the COMMONWEALTH OF VIRGINIA.

[Name]
District Health Director

Accepted:

[Name of Requester]

Date

COMMONWEALTH OF VIRGINIA

CITY / COUNTY OF _____.

The foregoing instrument was signed and acknowledged before me this _____ day of _____, 20____, by _____.

Notary Public

My Commission expires: